No. 89-152

In The

Supreme Court of the United States

October Term, 1989

VERA M. ENGLISH,

Petitioner,

v.

GENERAL ELECTRIC COMPANY,

Respondent.

On Writ Of Certiorari To The United States Court of Appeals For The Fourth Circuit

BRIEF FOR THE ATTORNEY GENERAL OF NORTH CAROLINA, THE NORTH CAROLINA COMMISSIONER OF LABOR, AND THE NORTH CAROLINA ACADEMY OF TRIAL LAWYERS AS *AMICI CURIAE* SUPPORTING REVERSAL

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INTEREST OF *AMICI CURIAE*

This brief is filed pursuant to Rule 37.3 of the Rules of this Court, the written consent of all parties having been filed with the Clerk.

This case raises the question whether a state common law tort claim for intentional infliction of emotional distress is preempted by a federal statute providing an administrative remedy for an employee who suffers employment discrimination in retaliation for making nuclear safety complaints. The federal courts below held that North Carolina's tort claim is preempted and dismissed this diversity action. Those decisions violate this Court's long-standing pronouncements concerning preemption of state law by federal statute and ignore North Carolina's legitimate interests in deterring and remedying extreme and outrageous conduct suffered by its citizens. Because this Court's decision will have a direct effect on matters of prime importance to *amici*, and in order to state clearly for the Court the interests of the State of North Carolina in preserving its citizens' right of action for intentional infliction of emotional distress, *amici* submit this brief to assist the Court in its resolution of the case.

The Attorney General of North Carolina and the Commissioner of Labor are the constitutionally-established elected officers representing, respectively, the North Carolina Department of Justice and the North Carolina Department of Labor and have a vital interest in preserving the common law rights of North Carolina citizens. The North Carolina Academy of Trial Lawyers is a voluntary bar association of more than 3,000 North Carolina lawyers who represent persons who have suffered civil injury or face criminal prosecution. The Academy is an affiliate of the Association of Trial Lawyers of America, and both the North Carolina Academy and the national

organization regularly appear as *amicus curiae* in litigation affecting the common law and statutory rights of employees such as are raised in the present case.

SUMMARY OF ARGUMENT

In order to provide its citizens a way to prevent and remedy outrageous conduct which intentionally or recklessly causes severe emotional distress, North Carolina recognizes a common law right of action for intentional infliction of emotional distress. In this and related contexts, North Carolina has aggressively preserved its citizens' rights of action to the maximum extent permitted by the Supremacy Clause. The courts below ignored these important state interests and misread Section 210 of the Energy Reorganization Act, 42 U.S.C. § 5851, erroneously concluding that the federal statute conflicts with those interests.

ARGUMENT

The course of this Court's preemption jurisprudence has established the fundamental presumption that federal legislation does not ordinarily nullify existing state law and "[w]here . . . the field which Congress is said to have pre-empted has been traditionally occupied by the States," the intent of Congress to supercede state laws must be "clear and manifest." *Jones v. Rath Packing Company*, 430 U.S. 519, 525 (1977). In the instant case, the courts below denigrated this fundamental principle of our federalist system by granting preemptive effect to the

limited federal administrative remedy provided by Section 210, thus nullifying for many North Carolina citizens their long-standing protection against intentional infliction of emotional distress. The courts below virtually ignored North Carolina's strong interest in preserving its common law right of action for intentional infliction of emotional distress and its clear and well-established policy of preserving state tort claims and remedies to the maximum extent permitted by the Supremacy Clause of the United States Constitution, Art. VI, cl. 2.

I. NORTH CAROLINA HAS A STRONG INTEREST IN PRESERVING ITS COMMON LAW RIGHT OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FOR ALL OF ITS CITIZENS.

Like that of most states, the common law of North Carolina recognizes a right of action for extreme and outrageous conduct which is intended to and does cause severe emotional distress. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). A plaintiff who can establish that she has been the victim of conduct which was "extreme and outrageous [and] intentionally or recklessly causes severe emotional distress," may recover under North Carolina law for the damages caused by that conduct. *Dickens, supra*, 276 N.C. at 447, 276 S.E.2d at 332, *quoting Restatement (Second) of Torts*, § 46 (1965).[1] North

[1] The courts below correctly concluded that the plaintiff in this case sufficiently alleged the elements of intentional infliction of emotional distress and therefore properly denied

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Carolina law also provides that the limitations period for bringing such a claim is three years, *Dickens, supra*, 276 N.C. at 444, 276 S.E.2d at 330, that the claim may be presented to a jury, and that the full panoply of compensatory and punitive damages may be awarded. *Brown v. Burlington Industries*, 93 N.C.App. 431, 438, 378 S.E.2d 232, 236-237, *pet. for disc. rev. granted*, 325 N.C. 270, 384 S.E.2d 513 (1989).

North Carolina's interest in affording this right of action has best been described as providing "an orderly way for the community to disapprove of [extreme and outrageous conduct] and compensate those victimized by it." *Woodruff v. Miller*, 64 N.C.App. 364, 367, 307 S.E.2d 176, 178 (1983). In short, North Carolina has a distinct interest in encouraging civility within its borders by protecting this right of its citizens.

The fact that extreme and outrageous conduct occurs on the job in no way diminishes the claim, and North Carolina employees have been held to state claims for intentional infliction of emotional distress when they allege intentional and extreme ridicule and humiliation by their co-employees or supervisors. *Brown v. Burlington Industries, supra; Dixon v. Stuart*, 85 N.C.App. 338, 354 S.E.2d 757 (1987); *Hogan v. Forsyth Country Club*, 79 N.C.App. 483, 340 S.E.2d 116, *disc. rev. denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). Indeed, the North Carolina courts have consistently and aggressively preserved this

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defendant's motion to dismiss for failure to state a claim upon which relief could be granted. (Pet. App. 26a-27a).

common law claim in the face of preemption arguments. For example, our courts reject arguments that job-related claims for intentional infliction of emotional distress are barred or preempted by the North Carolina Workers' Compensation Act. *Brown, supra,* 93 N.C.App. at 434-435, 378 S.E.2d at 234; *Hogan, supra,* 79 N.C.App. at 490, 340 S.E.2d at 121. Similarly, intentional infliction of emotional distress in the form of sexual harassment is held in North Carolina not to be preempted by the comprehensive federal system for remedying job-related sex discrimination and sexual harassment. *Id.* Thus, because of the value of this common law claim in deterring and remedying job-related extreme and outrageous conduct, North Carolina has resisted all attempts at preemption.

North Carolina has similarly pursued its established policy of preserving state law tort claims and remedies in related contexts. For example, despite the expansive preemptive effect wrought by the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.*, North Carolina has consistently sought to preserve tort claims to the maximum permissible extent. *E.g., R.H. Bouligny v. United Steel Workers,* 270 N.C. 160, 154 S.E.2d 344 (1967) (North Carolina will apply its law to effectuate tort claims and remedies except when "prevented" from doing so by clear federal law); *Erwin Mills, Inc. v. Textile Workers Union of America,* 234 N.C. 321, 67 S.E.2d 372 (1951).

North Carolina's interest in preserving its citizens' common law tort claims and remedies generally and its more specific interest in protecting the viability of the claim for intentional infliction of emotional distress is well-grounded in our federalism. Federal law is interstitial by nature, for its function is to fill gaps in regulation

which cannot be accomplished by the several states. Hart and Wechsler, *The Federal Courts and the Federal System,* at 435 (1953). Absent the clearest expression of Congressional intent to limit state remedies, therefore, courts have exercised restraint in permitting "federalization" of common law remedies. It is one thing for Congress to enact laws which provide for supplemental remedies; it is a much more serious business for a court to conclude that Congress has enacted an exclusive set of rules in a broad area such as the remedies available for extreme and outrageous conduct inflicted on persons who report nuclear safety violations. Certainly, the intent of Congress in enacting Section 210 was to broaden employee rights, not to confine them.

II. THE REASONING OF THE COURTS BELOW IGNORES THE IMPORTANT STATE INTERESTS AT STAKE WHILE IN NO WAY FURTHERING THE FEDERAL INTEREST SERVED BY SECTION 210.

The district court apparently found irreconcilable conflicts between the State interests embodied in North Carolina's tort claim and three aspects of the administrative scheme established by Section 210. None of those conflicts are real; rather, the state tort claim is completely consistent with and furthers the purposes of Section 210.

First, the district court read the barring of administrative relief to an employee who has deliberately violated nuclear safety provisions, 42 U.S.C. § 5851(g), to indicate Congressional intent that a violator receive absolutely no compensation from any source. (Pet. App. 20a). This conclusion reaches too far, for it immunizes illegal, outrageous treatment of an individual. The district

court's reasoning may apply to a discharge claim, relieving the employer from liability for terminating the violator, but cannot justify, and immunize, extreme and outrageous conduct directed at the violator and intended to cause emotional distress. This Court has so held in the closely analogous circumstances presented in *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290 (1977) (state's "substantial interest" in regulating outrageous conduct does not conflict with effective administration of pervasive federal scheme of regulating labor-management relations):

> No provision of the National Labor Relations Act protects the "outrageous conduct" complained of by petitioner . . . . Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct . . . which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." . . . [O]ur decisions permitting the exercise of state jurisdiction in tort actions [rest] . . . on the nature of the State's interest in protecting the health and well-being of its citizens.

Id. at 302-303. Similarly, Section 210 is grounded in no federal policy which would immunize an employer's engaging in outrageous conduct toward a violator of safety provisions.[2]

Second, the district court relied on the absence of any provision for punitive damages in an administrative

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[2] The district court was also concerned with possible reinstatement of the violator, but reinstatement is not a remedy available for intentional infliction of emotional distress under our State's common law. The remedy instead is compensatory and possibly punitive damages.

claim by the nuclear safety whistleblower. (Pet. App. 21a-22a).[3] Regardless of the reasons for the Congressional determination not to make punitive damages available through the administrative process, that determination cannot be read to mean that in no circumstances should a nuclear whistleblower receive punitive damages, particularly in light of Congressional silence on the question. *See* Brief for the United States as *Amicus Curiae* on Petition for Writ of Certiorari, at 9-10. The availability of punitive damages when the retaliation has been carried out by means of extreme and outrageous conduct intended to cause severe emotional distress plainly furthers the intent of Congress in prohibiting such retaliatory conduct and providing a remedy. Congress more likely intended to provide compensatory damages for retaliation which occurs because of protected whistleblowing activity but without extreme and outrageous conduct, and to leave to state law questions of punitive damages where the additional element of outrageous conduct is present, a result entirely consistent both with ordinary tort principles and with principles of federalism. The important consideration is that North Carolina's punitive damages remedy is intended to punish those who engage in such outrageous conduct in North Carolina and to deter others who might.

Finally, the lower court reasoned that the thirty-day limitation period on the federal whistleblower administrative claim may express Congressional intent that such

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[3] This concern, of course, disregards the availability of punitive damages in an enforcement action brought by the Secretary of Labor. 42 U.S.C. § 5851(d).

claims be brought quickly to the attention of regulatory authorities. (Pet. App. 22a). This observation does not, however, compel the conclusion that Congress meant to foreclose other remedies which states may allow to be invoked over a longer time. North Carolina has several interests in its three-year limitations period which are undermined by preemption. First, the victim is permitted time to assess her injuries and make a reasoned and deliberate choice about whether to make such a claim. Second, a victim of outrageous conduct is given sufficient time to assemble the resources and information necessary to obtain counsel and bring her claim. Third, the three-year period grants the parties time to attempt to settle claims before suit must be filed. None of these interests are served by a thirty-day claim deadline.

To effectuate fully its interests in deterring and remedying extreme and outrageous conduct, North Carolina has made available the three-year statute of limitations, the right to jury trial, and the possibility of punitive damages. Preemption denies North Carolina citizens the benefits of these protections. Preemption immunizes some employers from legitimate state tort claims while other employers are not so immunized. Conversely, preemption deprives this plaintiff of her claim while a co-worker at the same facility who alleges conduct equally extreme and malicious but not prompted by safety-related whistleblowing would retain the full tort remedy. North Carolina does not wish to have such a patchwork of remedies, providing a fair and orderly way to compensate those victimized by extreme conduct in some instances but not in others. Rather, North Carolina seeks to make available a remedy to all of its citizens for such

conduct. Similarly, each of the states has an evolving definition of the type of claim in issue here and the remedies available. Preemption federalizes the claim and cuts short that healthy and diverse evolution.

CONCLUSION

Deterring and remedying extreme, malicious conduct is an interest of the State of North Carolina which is "deeply rooted in local feeling and responsibility." *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 296 (1977), *quoting San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243-244 (1959). Preserving the State's means of serving that deeply rooted interest in no way conflicts with the federal purposes embodied in Section 210. Accordingly, the decision of the courts below should be reversed and the matter remanded for further proceedings on plaintiff's state law claim.

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